Boo Are Ngor (p) v Chua Mee Liang (p) (sued as public officer of Kim Leng Tze Temple)

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(I)-24 OF 2008(J)
ALAUDDIN PCA, HASHIM YUSOFF AND ZULKEFLI FCJJ
7 OCTOBER 2009

Civil Procedure — Striking out — Abuse of process of court — Plaintiff filed second suit after first suit struck out — Whether elected to end litigation by not appealing against first suit — Whether second suit an abuse of process of court — Whether defendant could invoke court's inherent power to strike out second suit

The plaintiff/respondent filed an action against the defendant/appellant for breach of trust at the Muar High Court ('the first suit'). However, upon the plaintiff's failure to comply with the court's direction as to the conduct of the suit, the first suit was struck out by an order dated 9 March 2002. The plaintiff, instead of appealing against the order, filed a second suit against the defendant. The defendant took part in the second suit by filing an appearance, statement of defence and amended statement of defence. However, due to repeated adjournments at the request of the plaintiff the notice of pre-trial case management which was filed on 8 November 2002 was not heard until 19 April 2006. The defendant therefore filed a summons to strike out the second suit on the ground that it amounted to an abuse of the court's process. The application was dismissed by the High Court and on appeal by the Court of Appeal. Hence this appeal by the defendant on the issue of whether the defendant was estopped from having the suit struck out where the suit was an abuse of the court process.

Held, allowing the appeal with costs:

(1) Estoppel is an equitable doctrine. In the present case, there was no basis upon which an equity could arise in favour of the plaintiff having noted that the plaintiff had in fact elected to end her litigation by not appealing against the High Court order dated 9 March 2002. The plaintiff was estopped from filing the second suit. The Court of Appeal therefore had misapplied the ratio of estoppel by election under the principle enunciated in *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7 (see para 5).

(2) The filing of appearance, statement of defence and amended statement of defence by the defendant did not constitute taking a fresh step in the proceedings that debars the defendant from challenging the validity of the second suit. The defendant had merely took a precautionary measure to prevent judgment in default being entered against her if she did not file the appearance and statement of defence (see para 6).

(3) Further, the delay in setting the case down for trial by the plaintiff in the second suit was no different from the first suit where the plaintiff, after having obtained the directions on the conduct of the suit, had failed to comply with the directions given by the High Court, leading to the striking out of the suit. Thus, the defendant had rightly applied to the court to invoke its inherent powers to strike out the plaintiff's second suit as an abuse of the process of the court (see para 7).

[Bahasa Malaysia summary

Plaintif/responden telah memfailkan satu tindakan terhadap defendan/perayu untuk pecah amanah di Mahkamah Tinggi Muar ('guaman pertama'). Walau bagaimanapun, di atas kegagalan plaintif mematuhi arahan mahkamah mengenai pengendalian guaman, guaman pertama telah dibatalkan melalui satu perintah bertarikh 9 Mac 2002. Plaintif, sebalik dari merayu terhadap perintah tersebut, telah memfailkan satu guaman kedua menentang defendan. Defendan mengambil bahagian dalam guaman kedua dengan memfailkan kehadiran, pernyataan pembelaan dan pernyataan pembelaan terpinda. Walau bagaimanapun, oleh kerana penangguhan yang berulangkali di atas permintaan plaintif, notis pengurusan kes pra-perbicaraan yang telah difailkan pada 8 November 2002 tidak didengar sehingga 19 April 2006. Defendan oleh itu telah memfailkan satu saman untuk membatalkan guaman kedua atas alasan bahawa ia merupakan satu penyalahgunaan proses mahkamah. Permohonan tersebut telah ditolak oleh Mahkamah Tinggi dan atas rayuan oleh Mahkamah Rayuan. Maka rayuan ini oleh defendan atas isu sama ada defendan adalah diestop daripada membatalkan guaman tersebut di mana guaman tersebut adalah satu penyalahgunaan proses mahkamah.

Diputuskan, membenarkan rayuan dengan kos:

(1) Estopel adalah satu doktrin ekuiti. Dalam kes ini, tidak ada asas di mana satu ekuiti mungkin timbul memihak kepada plaintif menyedari bahawa plaintif sebenarnya telah memilih untuk menamatkan litigasinya dengan tidak merayu terhadap perintah Mahkamah Tinggi bertarikh 9 Mac 2002. Plaintif adalah diestop daripada memfail guaman kedua. Mahkamah Rayuan oleh itu telah

menyalahgunakan ratio estopel secara pilihan di bawah prinsip yang ditetapkan dalam kes *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7 (lihat perenggan 5).

(2) Pemfailan kehadiran, pernyataan pembelaan dan pernyataan pembelaan terpinda oleh defendan tidaklah menjadi pengambilan langkah baru dalam prosiding yang menghalang defendan daripada mencabar kesahihan guaman kedua. Defendan telah hanya mengambil satu langkah berjaga-jaga untuk mencegah penghakiman ingkar dimasukkan terhadapnya jika dia tidak memfailkan kehadiran dan pernyataan pembelaan (lihat perenggan 6).

(3) Selanjutnya, kelewatan dalam menetapkan kes bagi perbicaraan oleh plaintif dalam guaman kedua tidak berbeza dengan guaman pertama di mana plaintif, setelah memperolehi arahan-arahan bagi pengendalian guaman, telah gagal untuk mematuhi arahan-arahan yang diberi oleh Mahkamah Tinggi, membawa kepada pembatalan guaman tersebut. Oleh itu, defendan telah dengan betulnya memohon kepada mahkamah untuk menggunakan kuasa-kuasa sedia adanya untuk membatalkan guaman kedua plaintif sebagai satu penyalahgunaan proses mahkamah (lihat perenggan 7).]

Notes

For cases on abuse of process of court, see 2(2) Mallal's Digest (4th Ed, 2007 Reissue) paras 6654.

Cases referred to

Bank Bumiputra Malaysia Berhad & Anor v Lorrain Esme Osman & Ors [1987] 2 MLJ 633; [1987] CLJ (Rep) 472, HC (refd)

Cheng Chuan Development Sdn Bhd v Ng Ah Hock [1982] 2 MLJ 222, FC (refd)

Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors [1998] 1 SLR 374, CA (refd)

Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd [1985] 1 MLJ 7, PC (distd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19(1), O 34

Appeal from: Civil Appeal No J-02–1019 of 2007 (Court of Appeal, Putrajaya)

Lum Chee Seng (Lum Chee Seng & Associates) for the appellant.

Chang Tau Sian (Wong You Fong with him) (Henry Soong & Chang) for the respondent.

Zulkefli FCJ (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant against the decision of the Court of Appeal which dismissed the appellant's appeal against the decision of the Muar High Court Civil Suit No 22–49 of 2002. Before the High Court, the appellant was the defendant and the respondent was the plaintiff. We shall refer to the parties as they were before the High Court.

BACKGROUND FACTS

[2] On 2 April 1996, the plaintiff filed an action against the defendant for breach of trust at the Muar High Court ('the first suit'). On 12 August 1999, the High Court gave directions as to the conduct of the suit. The plaintiff did not comply with these directions. On 9 March 2002, the High Court acting on a notice to show cause issued by it on 15 January 2002 made an order striking out the first suit. The plaintiff did not appeal against this order. Instead, the plaintiff filed a second suit against the defendant. This second suit was filed on 3 April 2002. The defendant took part in the second suit by filing an appearance, statement of defence and amended statement of defence. Pursuant to O 34 of the Rules of the High Court 1980 ('RHC 1980'), the plaintiff filed a notice of pre-trial case management on 8 November 2002, but until 19 April 2006, the notice was still not heard by the Muar High Court due to repeated adjournments made at the request of the plaintiff. There were also repeated changes of the plaintiff's solicitors and with each change of solicitors, the plaintiff made an application to amend her writ of summons and statement of claim. On 19 April 2006, the defendant took out a summons to strike out the second suit on the ground that it amounted to an abuse of the court's process. The High Court dismissed that application. The defendant appealed to the Court of Appeal against the decision of the High Court but her appeal was again dismissed.

THE APPEAL

[3] On 30 July 2008, this court granted leave to the defendant to appeal against the decision of the Court of Appeal on the following question:

> Where a defendant to a suit which is an abuse of process has taken part in the suit, is he estopped, by virtue of such participation from subsequently having it struck out?

DECISION

[4] It is noted the Court of Appeal in its judgment had recognised the

principle of law that where a plaintiff's action is struck out for disobedience of a peremptory order, a second action, as a general rule would constitute an abuse of the process of the court. The Court of Appeal went on to state had this been the principle applicable to the facts here, it would have had no hesitation in allowing the defendant's appeal. The Court of Appeal however made a finding that the facts before them are very different. The Court of Appeal dismissed the defendant's appeal on the ground of estoppel by election in that by virtue of her participation in the second suit, the defendant is thereby estopped from applying to strike out the second suit on ground of abuse of the court's process, citing the Privy Council's case of *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] 1 MLJ 7 as the authority for such a proposition.

[5] We would like to state here that estoppel is an equitable doctrine. Whatever description, whether estoppel by election, estoppel in pais, or promissory estoppels or quasi estoppels, it could only be invoked by a party who comes to court with clean hands. The plaintiff when relying on the equity of estopel by election, must show that she has an equity to enforce against the defendant (see the case of *Cheng Chuan Development Sdn Bhd v Ng Ah Hock* [1982] 2 MLJ 222). In the present case, there is no basis upon which an equity could arise in favour of the plaintiff having noted that the plaintiff in fact elected to end her litigation by not appealing against the High Court order dated 9 March 2002, striking out the plaintiff's first suit. The plaintiff is estopped from filing the second suit. With respect, on this issue we are of the view that the Court of Appeal had misapplied the ratio of estoppel by election under the principle enunciated in *Meng Leong*'s case. The respondent in *Meng Leong*'s case was faced with an alternative course of direction in the enforcement of judgment where the respondent having elected its course of direction to enforce judgment for damages, he was estopped from filing an appeal for specific performance. The abuse of the process of the court was not in issue in *Meng Leong*'s case. Unlike *Meng Leong*'s case, in the present case before this court, abuse of the process of the court is very much a contentious issue, and has nothing to do whatsoever with an enforcement of judgment as far as election of a mutually exclusive courses of direction is concerned. Hence *Meng Leong*'s case is readily distinguishable and could not be applied in the present case before this court.

[6] On the issue of whether the defendant having participated in the second suit has the right to apply to strike out the second suit, we are of the view that the course of action taken by the plaintiff and the degree of participation by the defendant in the second suit deserves a closer look. The defendant filed her appearance and statement of defence on 17 and 29 April 2002, respectively. She then filed the amended statement of defence on 11 July 2005 after amendment was made by the plaintiff to her statement of

claim. Although the plaintiff had filed a notice of pretrial case management on 8 November 2002, the hearing of the notice has been adjourned for at least eight times and has not been heard yet even when the defendant took out a summons to strike out the second suit on 19 April 2006. We are of the view that the filing of appearance, statement of defence and amended statement of defence by the defendant do not constitute taking a fresh step in the proceedings that debars the defendant from challenging the validity of the second suit. What the defendant has done in this case is to take precautionary measure to prevent judgment in default being entered against her if she does not file appearance and statement of defence.

[7] We also noted the fact that four years had lapsed after the plaintiff had filed a notice of pretrial case management, and the plaintiff still did not show any serious intention to set the case down for trial. This pattern of delay in setting the case down for trial as exhibited by the plaintiff in the second suit is no different from the first suit where the plaintiff after having obtained the directions on the conduct of the suit had failed to comply with the directions given by the High Court, leading to the issuance of the notice to show cause by the High Court and the striking out of the suit for disobedience to the peremptory order. Based on the background facts of this case, it is our judgment that the defendant had rightly applied to the court to invoke its inherent powers to strike out the plaintiff's second suit as an abuse of the process of the court. Order 18 r 19(1) of the RHC 1980 provides:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) it is otherwise an abuse of the process of the court; …

[8] It is our view that O 18 r 19(1) of the RHC 1980 does not specify a time limit during which a party may apply to the court to strike out a pleading. But the application should be made promptly and as a rule before the close of the pleadings. The court, however, may allow an application to be made even after the pleadings are closed. But such an application must be refused after the action has been set down for trial (see the case of *Bank Bumiputra Malaysia Berhad & Anor v Lorrain Esme Osman & Ors* [1987] 2 MLJ 633; [1987] CLJ (Rep) 472). Since the second suit has not been set

down for trial, the defendant in the present case in our view can still apply to strike out the second suit on the ground of abuse of the process of the court.

[9] We would also like to state here that it is the court which is empowered to deal with the abuse of its process in the interest of justice and on grounds of public policy. The defendant in the present case cannot be said to have waived her right to apply to strike out the second suit on the ground that she had participated in it. Under such circumstances, the court is not prevented from exercising its inherent jurisdiction to strike out cases found to have abused the process of the court. On this point, we would like to refer to the case of *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Ors* [1998] 1 SLR 374 wherein His Lordship Yong Pun How CJ, in delivering the judgment of the Court of Appeal of Singapore had this to say at p 384:

> The term, 'abuse of the process of the court', in O 18 r 19(1)(d), has been given a wide interpretation by the courts. It includes considerations of the public policy and the interest of justice. This term signifies that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery. It will prevent the judicial process from being used as a means of vexation and oppression in the process of litigation … if an action was not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it might be struck out as an abuse of the process of the court.

CONCLUSION

[10] For the reasons above stated, we would answer the question posed in this appeal in the negative. We would therefore allow the appeal with costs. We would herein make an order allowing the defendant's application to strike out the plaintiff's second suit on the ground of an abuse of the process of the court.

Appeal allowed with costs.

Reported by M Sivabarathi